

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALLEN HUBBARD,)	
)	NO. CV-13-0072-LRS
Plaintiff,)	
)	ORDER GRANTING DEFENDANT
-vs-)	GONZAGA'S MOTION FOR SUMMARY
)	JUDGMENT MOTION
CORPORATION OF GONZAGA)	
UNIVERSITY,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT is Defendant Corporation of Gonzaga University's ("Gonzaga") Motion For Summary Judgment (ECF No. 12). A telephonic oral argument was held on March 20, 2014. The Court granted Gonzaga's motion at the conclusion of the hearing. This order is entered to memorialize and supplement the Court's ruling in favor of Defendant.

I. SUMMARY OF BACKGROUND FACTS AND ARGUMENTS

Plaintiff Alan Hubbard ("Hubbard") is a professional photographer based in Spokane. Hubbard has taken many photographs of athletes including various athletes associated with Gonzaga University. Hubbard has applied for and received copyright registrations on his various photographs including photographs of athletes and others affiliated with Gonzaga University.

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1 On February 27, 2006, Hubbard filed civil Cause No. CV-06-64-EFS,
2 in the U.S. District Court for the Eastern District of Washington,
3 against the Corporation of Gonzaga University. ECF No. 14. On May 25,
4 2006, Hubbard filed a First Amended Complaint in Civil Cause No.
5 CV-06-64-EFS, adding eleven (11) additional defendants to whom it was
6 alleged that Gonzaga provided photographs. *Id.*

7 On November 29, 2006, and before discovery in that litigation was
8 taken, the two primary parties (Hubbard and Gonzaga) attended a
9 Settlement Conference in Yakima, Washington, before a Magistrate Judge.
10 Gonzaga was the only defendant that attended the Settlement Conference
11 and did so in order to reach a global settlement with Hubbard which would
12 include the dismissal of the first Hubbard lawsuit against all
13 defendants. Hubbard and Gonzaga reached a global settlement at the
14 Settlement Conference, which required the parties to, among other things,
15 prepare a written license agreement to all the Hubbard photographs taken
16 for Gonzaga. ECF No. 12.

17 On January 22, 2007, Hubbard and Gonzaga entered into a license
18 agreement. Hubbard claims he granted Gonzaga the right to make certain
19 "limited" use of various photographs "for purposes of promoting Gonzaga
20 University, its programs and activities." Hubbard further asserts that
21 Gonzaga has infringed his copyrights in his photographs and has violated
22 the terms of the License Agreement, by, in part, reproducing Hubbard's
23 copyrighted photographs and displaying or otherwise using them
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1 prominently in and on various DVD videos¹ that are sold commercially and
2 at a profit. Hubbard concludes that the phrase "for purposes of
3 promoting Gonzaga University" is ambiguous relative to Gonzaga's
4 profit-making use of the photographs and that whether or not a
5 contractual term is ambiguous is a question of fact. Hubbard seeks to
6 introduce extrinsic evidence, primarily from two prior discussions or
7 interactions he had with a Gonzaga representative occurring in January
8 of 2003 and in 2005, to clarify what he intended, i.e., use of his
9 photographs for only non-commercial, internal publications. ECF No. 21.

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11 Gonzaga argues that it paid \$55,000 to Hubbard in consideration for
12 the copyright rights licensed pursuant to the License Agreement.
13 Further, Gonzaga argues, paragraph 1 of the License Agreement entered
14 into by Hubbard (who was represented by an attorney) and Gonzaga on
15 January 22, 2007, is plain and reads:

16 1. Allen Hubbard ("Licensor") hereby grants The
17 Corporation of Gonzaga University ("Licensee") a
18 non-exclusive, royalty-free, perpetual license to
19 any and all photographs Licensor has taken prior to
20 the date of this License, for or related to Gonzaga
21 University, its students, sports and all other
22 activities and physical facilities ("Hubbard/Gonzaga
Photographs") including, without limitation, the
right to reproduce, distribute, publish, transmit,
modify and display any and all of said photographs,
for use in any media, for purposes of promoting
Gonzaga University, its programs and activities.

23 ECF No. 14-1.

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26 ¹Specifically involved in the instant lawsuit is the "Gonzaga
University Celebrating the Decade of Excellence 1999-2009" DVD ("Decade
of Excellence" DVD).

1 Gonzaga submits, by declaration, that the "plain meaning" of the phrase
2 "for purposes of promoting Gonzaga University" is broad, and dictionary
3 definitions reflecting the plain meaning include "the act of furthering
4 the growth or development of something", "to contribute to the growth,
5 enlargement or prosperity of", and "the act of setting up or furthering
6 a business enterprise." Gonzaga concludes that the scope of paragraph
7 1 of the 2007 License Agreement does not contain restrictions, as Hubbard
8 argues, to prevent Gonzaga from selling the Decade of Excellence DVD's
9 commercially or for a profit to promote Gonzaga University or restrict
10 Gonzaga to using the photographs only in internal publications.

11 **II. DISCUSSION**

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13 The Court finds that the 2007 License Agreement is plainly worded
14 and the scope is not as restrictive as Hubbard would have this Court
15 hold. The 2007 License Agreement has licensed Gonzaga to have, **without**
16 **limitation**, the right to reproduce, distribute, publish, transmit, modify
17 and display any and all photographs taken prior to January 22, 2007, for
18 use in any media, for purposes of promoting Gonzaga University, its
19 programs and activities.

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21 The Court finds that under *Berg v. Hudesman*,² and its progeny,
22 extrinsic evidence that directly contradicts that which is clear in the
23 contract cannot be put forth to clarify what a party to the contract
24 claims was "intended." In light of the Court's determination of the
25 scope of the 2007 License Agreement attained from the plain meaning of

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²*Berg v. Hudesman*, 801 P. 222, 115 Wn.2d 657, 662 (Wash. 1990).

1 section 1, the Court further finds the Decade of Excellence DVD falls
2 within the scope of the license granted.³

3 After reviewing the files and records herein, and the Court having
4 been fully advised, it is hereby:

5 **ORDERED, ADJUDGED AND DECREED**, that Defendant Gonzaga's Motion for
6 Summary Judgment, **ECF No. 12**, is **GRANTED** and all claims against Defendant
7 Gonzaga are dismissed with prejudice. The Court specifically finds that
8 the 2007 License Agreement:
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10 (1) Does not prohibit Gonzaga, in using Hubbard photographs taken
11 prior to January 22, 2007, from making a profit;

12 (2) Does not prohibit Gonzaga, in using Hubbard photographs taken
13 prior to January 22, 2007, from using them in a commercial way;

14 (3) Does not restrict Gonzaga to only using Hubbard photographs
15 taken prior to January 22, 2007 in Gonzaga's own publications;

16 (4) Does license Gonzaga to "the right to reproduce, distribute,
17 publish, transmit, modify and display any and all of said photographs,
18 for use in any media, for purposes of promoting Gonzaga University, its
19 programs and activities"; and

20 (5) The use of the Hubbard photographs taken prior to January 22,
21 2007 in the *Gonzaga University Celebrating the Decade of Excellence 1999-*
22 *2009* DVD and the production and sale of the DVD were "for purposes of
23 promoting Gonzaga University, its programs and activities" and therefore
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26 ³Plaintiff Hubbard has not disputed that the photographs used in the
Decade of Excellence DVD were taken prior to January 22, 2007.

1 within the scope of the 2007 License Agreement to Gonzaga.

2 The District Court Executive is directed to enter this Order, enter
3 judgment consistent with this order, and **CLOSE FILE**.

4 **DATED** this 26th day of March, 2014.

5 ***s/Lonny R. Suko***

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7 LONNY R. SUKO
8 SENIOR UNITED STATES DISTRICT JUDGE
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